NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NEWARK COALITION FOR LOW INCOME HOUSING, et al.	:	Civ. No. 89-1303(DRD)
Plaintiffs,	:	**OPINION**
v.	:	
NEWARK REDEVELOPMENT AND HOUSING AUTHORITY, and ALPHONSO JACKSON, Secretary of Housing and Urban Development,	:	
Defendants.	:	

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Debevoise, Senior United States District Judge

Plaintiffs challenge defendant's, Newark Redevelopment and Housing Authority's ("NHA"), sale of Mount Pleasant Estates townhouse units pursuant to an NHA homeownership plan that defendant, the Secretary of Housing and Urban Development ("HUD"), has approved. For the reasons set forth below the court need not determine whether the homeownership plan violates applicable statutes and regulations and concludes that the sales of these units disqualifies them from being considered replacement housing which NHA is obligated to construct pursuant to a 1989 Settlement Agreement, as amended from time to time, between plaintiffs, NHA and HUD.

I. Background

In 1989 plaintiffs instituted this action to compel NHA to perform various of its obligations under the law and, in particular, to prevent NHA from demolishing approximately 1506 public housing units constituting all of the buildings at Columbus Homes and other units in three buildings at Kretchmer Homes without providing one-for-one replacement units. HUD was joined as a party defendant. During the spring and summer of 1989 the parties engaged in intensive mediation and ultimately arrived at a Settlement Agreement.

The Settlement Agreement provided for certification of a plaintiff class which included: a) occupants of Kretchmer Homes between April 1, 1985 and the date of court approval of the Settlement Agreement, b) occupants of Columbus Homes between June 1, 1988 and the date of court approval of the Settlement Agreement, c) individuals or families who applied to NHA for admission to NHA's public housing as of the agreement date and were on NHA's waiting list for

public housing at any time after April 1, 1985.

In a section of the Settlement Agreement entitled "Replacement of Columbus Homes" the parties agreed that there would be a phased demolition of Columbus Homes, with demolition of specified buildings being dependent upon NHA achieving defined progress towards completing new units. Throughout this section the new units were referred to as "replacement housing."

Many vicissitudes attended NHA's attempts to complete the replacement housing and to comply with other requirements of the 1989 Settlement Agreement, during the course of which many hearings to enforce the Agreement were held, a Special Master was appointed, and an outside consultant, Abt Associates, Inc., was retained to assist NHA in its tasks. The Settlement Agreement was amended in 1995, 1996 and again in 1999. The 1999 Amendment (as did the earlier amendments) maintained NHA's obligation to provide replacement housing and a Schedule C to the 1999 Amendment set forth projects that had been completed and dates for meeting the various phases leading to completion of the remaining projects needed to bring the total up to 1777.

Schedule C to the 1999 Amendment showed that six of the fifteen projects (representing 753 units) had been completed and that nine (representing 1024 units) remained to be completed. Among the projects shown to have been completed was NJ 2-51 (Mount Pleasant Estates) a townhouse complex that contained 42 units. In December 1995 NHA had reported completion of this project to the parties and the court. In October 2000 NHA submitted an application to HUD to allow the sale of townhouse units at Mount Pleasant Estates as part of a homeownership program. HUD approved the NHA Homeownership Plan on February 8, 2001. Following this approval NHA was authorized to sell all or part of the Mount Pleasant Estates public housing

development.

The Plan contemplates that dwelling units will be offered to the existing occupants. However, only occupants or other NHA tenants or recipients of Section 8 Vouchers who could afford to buy these units were eligible buyers. This excluded large numbers of tenants who met public housing guidelines. At the time the Plan was drafted the approved fair market value of each unit was approximately $80,000 to $90,000, but because the units would be sold to qualified low-income families, the units would be sold for a maximum of 60% of the appraised value at the time of sale. There are restrictions on resale which are designed to prevent purchasers from rapid "flipping" properties to obtain windfall profits. The purchasers must use the property as their primary residence for ten years before all sales proceeds will go to them, but whenever such a property is sold it will have been removed from NHA's public housing stock available for the needs of poor families. The Plan has no provision to provide replacement housing.

The statutory authority for a public housing authority to conduct a homeownership program is found in 42 U.S.C. §1437 Z-4. Prior to 1998, as a condition for approval of homeownership plans, housing authorities had to obtain a funding commitment from HUD or another source for the replacement of each dwelling to be sold under the plan. 24 C.F.R. §906.16(a). This replacement requirement was repealed in 1998 and was not made a part of NHA's approved plan. There is a question, however, as to when the eliminations of the one-for-one replacement requirement went into effect.

On November 10, 1994 HUD issued a final rule governing the Section 5(h) Homeownership Program for public housing, 59 FR 56354. The regulation had required that there must be replacement housing for each unit sold under a homeownership plan, 24 C.F.R.

§906.16. The 1998 Quality Housing and Work Responsibility Act of 1998 added a new Section 32 that authorized a new public housing homeownership program without a replacement requirement.

On September 14, 1999 HUD proposed a new regulation to implement the new statute. Both the statute and the regulation eliminated the one-for-one replacement requirement for units sold. However, a December 22, 1999 administrative guidance for the homeownership process provided that until the proposed Section 32 regulation became a final rule, HUD would process homeownership proposals under its Section 5(h) regulations, 24 C.F.R. §906. That included the Section 906.16 requirement for one-for-one replacement for each unit sold into homeownership. On April 1, 2002 §906 was revised, but it continued the one-for-one replacement requirement. While the one-for-one replacement requirement was still in effect NHA submitted its homeownership plan application to HUD (October 2000) and HUD approved the plan (February 8, 2001).

On March 11, 2003 the new Section 32 regulation proposed on September 14, 1999 became a final rule, eliminating the one-for-one replacement requirement formerly contained in Section 906.16. Nevertheless it provided:

> Any existing section 5(h) or Turnkey III homeownership program continues to be governed by the requirements of part 906 or part 904 of this title, respectively, contained in the April 1, 2002, edition of 24 C.F.R., parts 700 to 1699. 24 C.F.R. §906.3(a); 63 FR 11722 (March 11, 2003). (emphasis added).

Thus it would appear that HUD's February 8, 2001 approval of NHA's Homeownership Plan, which did not contain a one-for-one replacement provision, was not in accordance with HUD's administrative guidance and regulations.

Mount Pleasant Estates contains 42 townhouse units. As of December 29, 2004 six units were sold. Twenty-six units were under contract and awaiting closings. Of these twenty-six units, two of the purchasers were nearly ready for closing. Eight of the residents at Mount Pleasant Estates had not exercised their option to sign a contract to purchase their units and two units were vacant.

At a November 12, 2004 hearing plaintiffs raised objections to those sales and contended that the inclusion of any of the 1777 replacement units in a homeownership plan violated the Settlement Agreement. Both HUD and NHA took a contrary position, arguing that there was no provision in that Agreement that prohibited sale of the 42 Mount Pleasant Estates units pursuant to a homeownership plan. The question has been briefed and a hearing was held on January 10, 2005.

II. Discussion

Plaintiffs challenge the lawfulness of the Mount Pleasant Estates homeownership plan on the ground that it fails to incorporate a one-for-one replacement provision. They cite in support of their position the HUD guidance and regulations in effect during the processing of NHA's application for approval of its homeownership plan. At the January 10, 2005 hearing HUD's attorney was unable to provide an answer to this contention. In its brief NHA stated "[t]he new program also contains a provision which permits conversion of an existing program, under the old regulations, into a program under the new regulations, with HUD approval. See 24 C.F.R. §906.4." NHA's application for approval of its plan and HUD's processing the application took place while the regulations requiring one-for-one replacement were in effect. No evidence was submitted evidencing HUD's approval of a conversion of NHA's homeownership plan after the

new Section 32 regulation went into effect on March 11, 2003.

Regardless of NHA's compliance with applicable HUD regulations, it is readily apparent that in the present circumstances the 42 Mount Pleasant Estates units do not qualify as replacement units under the Settlement Agreement.

A settlement agreement "is a contract subject to the rules of contract interpretation." Pennwalt Corp. v. Plough, Inc., 676 F.2d 77, 79 (3d Cir. 1982). A court should look to the agreement itself for the meaning of its terms. Halderman v. Pennhurst State School and Hospital, 901 F.2d 311, 319 (3d Cir. 1990), cert. den., 498 U.S. 850 (1990).

In the 1989 Settlement Agreement, as amended, NHA undertook to provide 1777 "replacement housing units." The obligation was set forth in a section entitled "Replacement of Columbus Homes." The word "replacement" is found repeatedly throughout the Agreement.

A recital states "the parties herein desire to provide housing for as many low-income families as possible with the limited resources available for such housing in the City of Newark," and another recital notes that "the parties recognize that NHA is primarily responsible under law for the development and management of low-income public housing in the City of Newark."

This Agreement was entered into in the context of a desperate need for low income housing in the City of Newark. There were still residents of Columbus and Kretchmer Homes who had to be relocated; vast numbers of low income public housing units were unfit for habitation; NHA proved incapable of repairing and re-renting units that became vacant; NHA had proved utterly incapable of meeting its statutory obligation to provide one-for-one replacement of demolished housing projects; there was a waiting list of 10,000 or more families seeking access to the rapidly diminishing NHA housing stock; in these circumstances the number

of available public housing units was rapidly diminishing in the face of a rapidly increasing need for low income housing.

For these reasons there were named in the Agreement as class members i) occupants of Kretchmer Homes, ii) occupants of Columbus Homes, and iii) individuals or families who had applied to NHA for admission to NHA's public housing and were on NHA's waiting list.

The "replacement" housing called for in the Settlement Agreement was designed to at least make a start towards fulfilling the needs of these three categories of plaintiffs. It is inconceivable that units that could be removed from the public housing stock and sold into private hands could qualify as "replacement units."

The homeownership concept meets totally desirable ends. However, it addresses very different objectives from those that the Settlement Agreement addresses. It permits those who have risen somewhat higher on the economic scale to own their homes with all the personal satisfactions and positive community values that such ownership brings with it. The Settlement Agreement is designed to maximize the availability of habitable residences to truly low income families such as are represented by the plaintiffs in this case.

The Agreement provided for the creation of 1777 units for such families. If these units become subject to a homeowners plan, immediately upon sale, they would be withdrawn from NHA's housing stock and never again be available for NHA rental to low income families. The initial purchaser would be a person eligible for NHA housing or for Section 8 vouchers, provided he or she could meet specified economic or other criteria, but that person could sell the unit on the open market. After ten years the purchaser could resell and retain all the profits derived from the sale. This is the effect of NHA's implementation of the Mount Pleasant Estates

homeownership plan. Immediately after certifying the completed 42 units of Mount Pleasant Estates as "replacement" housing NHA took steps to sell them out from under NHA's control, rendering them unavailable to any of the categories of plaintiffs.

It is true that the Settlement Agreement does not contain a clause expressly prohibiting the disposition of the 1777 replacement units through the vehicle of a homeownership plan. By no stretch of the Agreement's specified language and underlying purpose, however, can units subject to a homeowners purchase plan constitute replacement units under the Agreement.

III. Conclusion

As previously noted, it is unnecessary to determine whether the Mount Pleasant Estates ownership plan was adopted in accordance with HUD regulations. That is a matter which is a concern of HUD and NHA. In any event the sale process is too far advanced to upset the program at this late date.

The holding that the 42 Mount Pleasant Estates units do not qualify as replacement housing under the Settlement Agreement as amended requires that NHA construct 42 additional units that will qualify under the Agreement. The court will file an appropriate order.

Dated: January 21, 2005

DICKINSON R. DEBEVOISE
U.S.S.D.J.